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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5569

DATE COMPLAINT FILED: October 14, 2004

DATE OF NOTIFICATION: October 21, 2004

LAST RESPONSE RECEIVED: Nov. 23, 2004

DATE ACTIVATED: August 16, 2005

EXPIRATION OF SOL: July 1, 2009

COMPLAINANT:

Donald F. McGahn, II

RESPONDENTS:

John Kobylt

Ken Chiampou

The John and Ken Show

KFI AM-640

Cynthia Matthews

Committee to Elect Cynthia Matthews and Kinde
Durkee, in her official capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 441(e)(1)(A)

2 U.S.C. § 441b(a)

2 U.S.C. § 431(9)(B)(i)

11 C.F.R. § 109.21

11 C.F.R. § 100.73

11 C.F.R. § 100.132

INTERNAL REPORTS CHECKED:

None

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter arises from a complaint alleging that a radio talk show called "The John and Ken Show," its hosts, John Kobylt and Ken Chiampou, and radio station KFI AM-640, violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by unlawfully providing and coordinating corporate contributions to the benefit of Cynthia Matthews' campaign. The

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1 complaint also alleges that Cynthia Matthews, a 2004 candidate for a seat in California's 26th
2 Congressional District and Matthews' principal authorized committee, the Committee to Elect
3 Cynthia Matthews and Kinde Durkee, in her official capacity as treasurer ("the Committee"),
4 violated the Act by unlawfully receiving and coordinating corporate contributions.

5 The complaint specifically alleges that (1) Cynthia Matthews directed and she and the
6 Committee received illegal corporate contributions in violation of 2 U.S.C. § 441i(e)(1)(A) and
7 11 C.F.R. § 300.62; (2) The John and Ken Show and KFI AM-640 made illegal corporate
8 expenditures in violation of 11 C.F.R. § 114.2(b)(2)(i), (ii), and (iii); (3) The John and Ken Show
9 and KFI AM-640 made illegal in-kind corporate contributions in violation of 2 U.S.C. § 441b(a)
10 and 11 C.F.R. § 114.2(a); and (4) The John and Ken Show, KFI AM-640, and Cynthia Matthews
11 participated in illegal corporate coordination in violation of 11 C.F.R. § 109.21. The complaint
12 maintains that Respondents' alleged violations were knowing and willful.

13 In a joint response ("KFI Response"), KFI AM-640, John Kobylt and Ken Chiampou
14 assert that KFI AM-640's broadcasts of the Show fall within the legitimate press function of a
15 *bona fide* media entity, and are entitled to the Act's media exemptions.¹ A joint response from
16 Cynthia Matthews and the Committee ("Matthews Response") denies coordination with the
17 station with regard to the station's programming. Kinde Durkee, the Committee's treasurer,
18 separately submitted a sworn declaration ("Durkee Decl.") denying knowledge of any in-kind
19 contributions from KFI AM-640 or any "intentional coordination" efforts between the
20 Committee and KFI AM-640 or The John and Ken Show. *See* Durkee Decl. at 2.

¹ Counsel for KFI AM-640 represents that his client is Clear Channel Communications, Inc., the owner of Capstar, which in turn owns the radio station. In view of our recommended disposition, *see* discussion *infra*, we do not recommend generating Clear Channel Communications, Inc. as a respondent in this matter.

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1 Because we conclude that the media exemption applies, this Office recommends that the
2 Commission find no reason to believe that any of the Respondents violated the Act in connection
3 with broadcasts of The John and Ken Show, and close the file.

4 **II. FACTS**

5 The "John and Ken Show" ("the Show") is a radio talk show hosted by John Kobylt and
6 Ken Chiampou ("John and Ken") on KFI AM-640 ("the station") in Burbank, California. KFI
7 AM-640 is owned by Capstar Radio Operating Company, which in turn is a wholly-owned
8 subsidiary of Clear Channel Communications, Inc. The station's daily programming features
9 regular news reports and 17 talk shows. By 2004, the station had been broadcasting the Show
10 for over ten years. KFI Response at 1-3.

11 Beginning in July 2004, the Show began to promote a segment entitled "Political Human
12 Sacrifice." For the segment, John and Ken asked their listeners to select individual political
13 candidates to be singled out for electoral defeat based on dissatisfaction with his or her position
14 on illegal immigration. *See* KFI Response at 3. In September, John and Ken announced on the
15 Show that listeners had selected sitting Congressmen David Dreier and Joe Baca to be the
16 Show's "Political Human Sacrifices." John and Ken then began on-air discussions of the records
17 of Congressmen Dreier and Baca with regard to illegal immigration, and began editorializing in
18 opposition to their re-elections and in favor of their opponents' elections. Examples of such
19 statements quoted in the complaint with respect to Congressman Dreier and his Democratic
20 opponent in California's 26th District, Cynthia Matthews, include: "Cynthia Matthews, we don't
21 mention her name enough and we should. Cynthia Matthews is running against Dreier and she is
22 the one you ought to vote for;" "Dreier has to be taken out;" and "Cynthia Matthews is running
23 against David Dreier. She's got our full support." *See* Complaint at 4.

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1 The station and the Show carried references to the "Political Human Sacrifice" segments
2 on their web sites, and complainant alleges that those sites also included hyperlinks to Cynthia
3 Matthews' campaign web site.² Complainant also states that, during a live, on-air interview of
4 Matthews, John and Ken told her to "[g]ive out a website if you want to get some volunteers,
5 money, some support, go ahead." To this, Matthews allegedly responded by providing her web
6 address, phone number, the address of and directions to her campaign headquarters.

7 On September 16, 2004, the Show broadcast live from a location outside of Congressman
8 Dreier's district office. The broadcast was characterized on the Show's web site as a "Fire
9 Dreier' Rally" and a "Political Human Sacrifice Rally." Cynthia Matthews was invited to appear
10 at the broadcast location, where John and Ken again interviewed her regarding her position on
11 illegal immigration. Enclosed with the complaint is an audio broadcast of this program,
12 featuring a voiceover introduction saying "We now take you live to Glendora, live, in the heart
13 of David Dreier's soon-to-be-former district," and including statements about how the hosts
14 "would love to climb right up there and just take [Dreier's] name off that office . . . because they
15 won't need it after November 2nd." Also enclosed with the complaint are photographs apparently
16 printed from the station's web site, showing the hosts at the live broadcast interviewing
17 Matthews and members of the audience, and showing individuals holding signs showing
18 statements such as "Fire Dreier" and "Dreier Works for Terrorists Not America."

19 According to John Kobylt, in the months leading up to the 2004 election, Congressman
20 Dreier turned down invitations to be interviewed on the Show. Affidavit of John Kobylt, dated
21 Nov. 22, 2004 ("Kobylt Aff.") at 2. John and Ken allegedly also spoke out against the re-

² Pages from the web site attached to the complaint include statements such as: "Congressman David Dreier (Rep.) and Joe Baca (Dem.) are the choices to be politically sacrificed. KFI listeners are encouraged to tell everyone to vote these two hacks out of office."

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1 election of Congressman Baca and promoted the election of his Republican opponent during
2 broadcasts of the Show. They also held a live broadcast of the Show in Baca's "backyard." See
3 Complaint, Ex. 2 (stating that on October 7th "John & Ken will be taking Political Human
4 Sacrifice to the backyard of Congressman Joe Baca!"). The complaint, however, makes no
5 allegations regarding Respondents' dealings with the Baca campaign.

6 **III. LEGAL ANALYSIS**

7 The Act prohibits corporations from making contributions or expenditures from their
8 general treasury funds in connection with any election of any candidate for Federal office.
9 2 U.S.C. § 441b(a). The Act defines "contribution" and "expenditure" to include "anything of
10 value" made for the purpose of influencing any election for Federal office. 2 U.S.C. § 431(8)
11 and (9). The term "anything of value" includes in-kind contributions. 11 C.F.R. § 100.52(d)(1).
12 Contributions and expenditures must be disclosed under the Act. 2 U.S.C. §§ 432 and 434.

13 The Act's media exemption, however, excludes from the definition of expenditure "any
14 news story, commentary, or editorial distributed through the facilities of any broadcasting station
15 . . . unless such facilities are owned or controlled by any political party, political committee, or
16 candidate." 2 U.S.C. § 431(9)(B).

17 Any party claiming the media exemption is subject to a two-part test. First, the
18 Commission asks whether the entity engaging in the activity is a media entity within the meaning
19 of the Act and the Commission's regulations. See Advisory Opinion 2005-16 (Fired Up) at 5.
20 and other advisory opinions cited therein. Second, the Commission, in determining the
21 exemption's scope, asks (a) whether the media entity is owned or controlled by a political party,
22 committee, or candidate; and, if not, (b) whether the entity was functioning within the scope of a
23 legitimate media entity at the time of the alleged violation. If the media entity is independent of

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1 any political party, committee, or candidate, and if it was acting as a legitimate media entity at
2 the time of the alleged violation, it is exempt from the Act's restrictions on corporate
3 contributions and expenditures, and the Commission's inquiry should end. *See id.*; *see also*
4 *Reader's Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); and *FEC v.*
5 *Phillips Publishing*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981).

6 In this matter, complainant alleges that the radio air time and live broadcast rally that
7 expressly advocated the defeat of Congressman Dreier and the election of Cynthia Matthews
8 amounted to illegal in-kind corporate contributions to the Matthews campaign.³ Addressing the
9 allegations, we first consider whether the station broadcasts from within the Show's studio
10 qualify for the media exemption. Concluding the station qualifies for the media exemption for
11 in-station broadcasts of the Show, the second question is whether the live broadcast "rally" falls
12 within the legitimate press function of a *bona fide* media entity and therefore also qualifies for
13 the media exemption. We again conclude that it does.

14 **A. The In-Studio Broadcasts Qualify for the Media Exemption**

15 In this case, "The John and Ken Show" is broadcast on KFI AM-640. That station is not
16 owned or controlled by any party, candidate or committee but by Capstar Radio Operating
17 Company ("Capstar"). Capstar, in turn, is a wholly-owned subsidiary of Clear Channel
18 Communications, Inc., which operates approximately 1,182 radio and 37 television stations in
19 the United States. *See* KFI Response at 2. Moreover, an affidavit from John Kobylt attests to
20 the fact that he and Ken Chiampou "make all editorial decisions regarding the content" of the
21 show, "subject only to editorial input from KFI-AM radio station and the extemporaneous,

³ Although the complainant refers to web site content in the complaint's factual background, his legal analysis only identifies radio broadcasts and the rally as activities that allegedly violated the Act.

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1 unscripted comments of the people” they interview on air and those who call in to the show.
2 Kobylt Aff. at 2.

3 The Show “covers, among other social and cultural topics, current events, politics and
4 public policy.” KFI Response at 3. On the Show, John and Ken editorialize and comment on
5 current events, political issues, and candidates for public office. They have focused “continuing
6 news and editorial coverage” on “illegal immigration, the resulting demand for public services
7 by non-citizens, and the costs imposed upon California taxpayers.” See KFI Response at 3 and
8 n. 16 therein. In this context, therefore, the Show’s editorials and commentaries on the political
9 platforms and records of Congressman Dreier, Congressman Baca and their opponents fall
10 squarely within the legitimate press function of the radio station and are covered by the Act’s
11 media exemptions. See Advisory Opinion 2005-16 (Fired Up) at 6 (noting that “an entity
12 otherwise eligible for the press exception would not lose its eligibility merely because of a lack
13 of objectivity . . . even if the news story, commentary, or editorial expressly advocates the
14 election or defeat of a clearly identified candidate for Federal office”). See also Statement of
15 Reasons by Commissioner Weintraub in MURs 5540, 5545, 5562 and 5570 (CBS, Kerry/Edward
16 2004, Inc. and Sinclair Broadcasting) at 2 (“Whether particular broadcasts were fair, balanced, or
17 accurate is irrelevant given the applicability of the press exemption.”); Statement of Reasons by
18 Commissioners Wold, McDonald, Mason, Sandstrom, and Thomas in MURs 4929, 5006, 5090
19 and 5117 (ABC, CBS, NBC, New York Times, Los Angeles Times and Washington Post)
20 (“Unbalanced news reporting and commentary are included in the activities protected by the
21 media exemption”).

22 On-air interviews of candidates also fall within the bounds of the press exemption, and
23 therefore, interviews of Cynthia Matthews, both in the station and at the live broadcast, are

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1 legitimate press functions of a media entity. *See* Advisory Opinion 2004-07 at 6-7 (MTV) (on-
2 air candidate interviews covered by media exemption); *see also* Advisory Opinion 1987-08 at 5-
3 6 (U.S. News) (candidate interviews covered by news-story exemption).

4 **B. "Legitimate Press Function" and the Live Broadcast/Rally**

5 As noted above, editorials and commentaries supporting the election or defeat of specific
6 Federal candidates falls within the legitimate press function of a press entity. This matter,
7 however, presents the additional issue of whether the live broadcast and "rally" on location
8 outside Congressman Dreier's office also is covered by the media exemption.

9 According to the Supreme Court, considerations of consistency and form must be taken
10 into account when determining the limits of the media exemption. *FEC v. Massachusetts*
11 *Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986) ("*MCFL*"). In that case, the Court found that a
12 "special edition" newsletter was not "comparable to any single issue of the newsletter" because
13 the audience reached, the absence of a masthead, and other "considerations of form"
14 distinguished it as a campaign flyer rather than one in a series of a "regular" publication. It was
15 therefore not within the media exemption. *Id.* *See also* Advisory Opinion 2005-16 (Fired Up) at
16 5 (a consideration in applying media exemption analysis is "whether the entity's materials are
17 comparable in form to those ordinarily issued by the entity," citing *MCFL*).

18 In Advisory Opinion 2004-30, as part of the Commission's guidance that the media
19 exception would not be available to Citizens United, it focused on "considerations of form," such
20 as those referenced in *MCFL*. Citizens United had proposed to make and pay to telecast a
21 documentary film containing references to John Kerry and John Edwards within 60 days of the
22 2004 general election. Because Citizens United did not "regularly produce documentaries or pay
23 to broadcast them," its proposed paid broadcasts were not within the analogous electioneering

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1 communications media exemption at 11 C.F.R. § 100.29(c)(2). *Cf.* MURs 5540 (CBS) and 5545
2 (Kerry/Edwards 2004, Inc.) (Commission found no reason to believe that CBS violated the Act
3 where it was undisputed that 60 Minutes broadcast in question was similar in form to other 60
4 Minutes shows broadcast on the network).

5 The "John and Ken Show" has apparently staged and broadcast public rallies on several
6 occasions prior to the "Political Human Sacrifice" rally outside Congressman Dreier's office.
7 Previous rallies include a live "recall rally" broadcast at the office of former Governor Gray
8 Davis to discuss the Governor's performance in office and a statewide recall effort; a live
9 "election day rally" show to call attention to criminal accusations about a local judge; a
10 broadcast "rally" in Orange County, followed by a caravan to Sacramento, to editorialize against
11 a proposed SUV tax; and an "anti-tax rally" broadcast in front of the New Jersey state capitol.
12 Additional remote broadcasts of the Show include a live show broadcast from the Democratic
13 National Convention in Los Angeles; a live show broadcast from the Republican National
14 Convention in San Diego; and "numerous" live shows in public places addressing issues such as
15 car taxes, vehicle license fees, and driver's licenses for illegal immigrants. *Id.* at 1-2. Thus, it
16 appears that because the rally was, in fact, broadcast, and because it was similar in form to other
17 broadcast events featured on the Show, it was within the Show's legitimate press function. As
18 such, the costs incurred in covering or carrying it – including the staging costs – are within the
19 media exemption.

20 **C. Alleged Electioneering and Coordinated Communications**

21 The Act also provides a media exemption for what would otherwise be considered an
22 unlawful "electioneering communication." *See* 2 U.S.C. § 434(f)(3)(B); 11 C.F.R.

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1 § 100.29(c)(2). Because Respondents' communications about the election appeared "in a news
2 story, commentary, or editorial distributed through the facilities of any broadcast station," they
3 are excluded from the definition of "electioneering communication" under the Act.

4 The media exemption, where applicable, also encompasses what otherwise would be
5 deemed "coordinated communication" between a candidate or committee and a *bona fide*
6 corporate media entity, which might lead to violations of section 441b. See 11 C.F.R.
7 §109.21(b); 11 C.F.R. §§ 100.73 and 100.132. Since the media exemption applies to the activity
8 in this case, the alleged coordinated communications do not violate the Act.

9 **D. "Soft Money" Allegations**

10 Federal candidates and their agents, or entities directly or indirectly established, financed,
11 maintained or controlled by, or acting on behalf of one or more candidates, are restricted from
12 soliciting, receiving, directing, transferring, or spending "soft money," *i.e.*, funds that are not
13 subject to the limitations, prohibitions, and reporting requirements of the Act. See 2 U.S.C.
14 §441i(e)(1)(A). Neither Matthews nor the Committee appear to be in violation of this statute.
15 Though complainant charges that Matthews received free air time and editorial support from
16 KFI-AM, John and Ken, and the Show for her campaign, because their activities are exempt
17 from the definitions of "contribution" and "expenditure" under the media exemption, 11 C.F.R.
18 §§ 100.73 and 100.132, neither she nor the Committee received illegal corporate contributions in
19 violation of 2 U.S.C. § 441i(e)(1)(A).

20 Based on the above, this Office recommends that the Commission find no reason to
21 believe that John Kobylt, Ken Chiampou, the John and Ken Show, KFI-AM 640, Cynthia
22 Matthews, or the Committee to Elect Cynthia Matthews and Kinde Durkee, in her official
23 capacity as treasurer, violated the Act or the Commission's regulations, and close the file.

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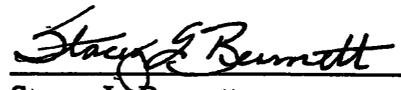
1 **IV. RECOMMENDATIONS**

- 2 1. Find no reason to believe that John Kobylt, Ken Chiampou, the John and Ken
3 Show and KFI-AM 640 violated the Federal Election Act of 1971, as amended, or
4 the Commission's regulations in connection with the allegations in MUR 5569.
5
6 2. Find no reason to believe that Cynthia Matthews or the Committee to Elect
7 Cynthia Matthews and Kinde Durkee, in her official capacity as treasurer,
8 violated the Federal Election Act of 1971, as amended, or the Commission's
9 regulations in connection with the allegations in MUR 5569.
10
11 3. Close the file.
12
13 4. Approve the appropriate letters.
14

15
16
17 4/19/06
18 Date

19 
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21 Deputy Associate General Counsel
22 for Enforcement

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24 Susan L. Lebeaux
25 Assistant General Counsel

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